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No. 01-419

IN THE

Supreme Court of the United States

CITY OF COLUMBUS, *et al.*,

Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE CITY OF DALLAS IN SUPPORT OF PETITIONERS

MADELEINE B. JOHNSON
City Attorney
CHRISTOPHER D. BOWERS*
Assistant City Attorney
City of Dallas
7BN Dallas City Hall
1500 Marilla Street
Dallas, Texas 75201-6318
(214) 670-3519

* *Counsel of Record*

Counsel for Amicus

172422

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTEREST OF AMICUS

The City of Dallas ("City") has a population of almost 1.2 million, which makes it the eighth largest city in the United States. For more than 60 years, predatory practices by some members of the vehicle towing industry have endangered public safety in the City. *See City of Dallas v. Harris*, 157 S.W.2d 710 (Tex. Civ. App. – Dallas 1941, writ ref'd). In *Harris*, the court described a few of the dangers connected with the towing industry in Dallas:

> It is further shown by testimony that wrecking and ambulance companies, as well as other ambulance chasers, have their places of business and tow-cars equipped with radio sets capable of receiving the short wave police broadcasts, thereby intercepting the City police's radio communications relative to automobile accidents. They then cause their solicitors to race to the scene of the accident in the hope of securing the business of towing the disabled automobiles for repairs. They solicit at the scene of the accident, and on the street and sidewalks, patronage of the persons involved; and ofttimes, encountering lively competition in securing possession of the wrecked automobiles, engage in breaches of the peace among themselves, thereby, in many instances, interfering with police investigation in obtaining information concerning the cause of and blame for the wreck. It also came to the notice of the City Council that wrecker operators make a practice of racing to scenes of accidents, in order to be there first to solicit the business; and, in racing, the drivers and operators invariably violate the traffic ordinances of the City and greatly

> interfere with and obstruct traffic, both en route and upon arrival at the scene of the wreck.

Id. at 711.

To protect the public from unsafe towing practices, the City for more than 60 years has required tow truck companies and their drivers to meet specific safety standards before engaging in the business of towing wrecked and disabled motor vehicles. *See A. J.'s Wrecker Serv., Inc. v. City of Dallas*, Nos. Civ. A. 3:97-CV-1311D, Civ. A. 3:97-CV-2398D, 1998 WL 185521, at *1 (N.D. Tex. April 15, 1998), *abrogated in part by Stucky v. City of San Antonio*, 260 F.3d 424 (5th Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3465 (U.S. Dec. 13, 2001) (No. 01-1028); *Harris*, 157 S.W.2d at 710-11.

Aside from its general interest in protecting public safety, the City has a direct interest in the Court's determination of the question presented by this case because the City recently filed its own petition for a writ of certiorari on this issue. *See Cole v. City of Dallas*, No. 01-10194 (5th Cir. Nov. 9, 2001) (per curiam) (unpublished), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Feb. 7, 2002) (No. 01-___).

In that case, Peter T. Cole ("Cole") applied to the City for a wrecker driver's permit in early 2000. The City denied his application because he was disqualified under Chapter 48A of the Dallas City Code. Chapter 48A governs nonconsensual towing of motor vehicles from private property. It includes licensing, signage, reporting, inspection, vehicle, equipment, insurance, and rate requirements. Chapter 48A specifically prohibits a person from receiving a wrecker driver's permit if he or she has been convicted of violating the Texas Controlled Substances Act, or a comparable law, that is punishable as a felony, and fewer than five years have

elapsed since the date of release from confinement for the conviction. Cole was disqualified because he had been confined for delivery of a controlled substance (cocaine), a felony, within five years of the date he submitted his application.

In response, Cole sued the City, asserting that Chapter 48A of the Dallas City Code was pre-empted by 49 U.S.C. § 14501(c). The U.S. District Court for the Northern District of Texas denied Cole's request for a preliminary injunction and entered judgment against him. Cole appealed to the Fifth Circuit. While Cole's appeal was pending, the Fifth Circuit issued its opinion in a towing regulation pre-emption case. *See Stucky v. City of San Antonio*, 260 F.3d 424 (5th Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3465 (U.S. Dec. 13, 2001) (No. 01-1028). The *Stucky* court acknowledged "the closeness of the issue and the soundness of the arguments on either side" of "this difficult [pre-emption] issue," but concluded that 49 U.S.C. § 14501(c) pre-empted San Antonio's tow truck ordinance. *Id.*, 260 F.3d at 440, 446. Based on *Stucky*, the Fifth Circuit then vacated the district court's judgment in *Cole* and remanded it to that court. On February 7, 2002, the City timely filed its petition for a writ of certiorari.

SUMMARY OF ARGUMENT

Four circuits, including the Sixth, have held that 49 U.S.C. § 14501(c) pre-empts municipal regulation of tow trucks. *See Stucky*, 260 F.3d 424; *Petrey v. City of Toledo*, 246 F.3d 548 (6th Cir. 2001); *Tocher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir. 2000), *cert. denied*, 531 U.S. 1146 (2001); *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999). All four circuits found that their interpretations were consistent with the goal of the Interstate Commerce

Commission Termination Act ("ICC Termination Act"), which was to increase competition among motor carriers by eliminating burdensome state and local laws. *See Stucky*, F.3d at 444-46; *Petrey*, 246 F.3d at 563; *Tocher*, 219 F.3d at 1051; *Mayer*, 153 F.3d at 546. Furthermore, three of those circuits, including the Sixth, did not believe that this Court's decision in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), required it to interpret "State" to include a State's political subdivisions in all circumstances because the law at issue in *Mortier* was different than Section 14501(c). *See Stucky*, F.3d at 443; *Petrey*, 246 F.3d at 561-62; *Mayer*, 153 F.3d at 546-47. In addition, all four circuits have relied on "the presumption that, when Congress omits certain language in a particular subsection of a statute and includes the language in other subsections, the omission is intentional rather than accidental." *Mayer*, 153 F.3d at 545; *see also Stucky*, F.3d at 440-41; *Petrey*, 246 F.3d at 561; *Tocher*, 219 F.3d at 1051.

As is shown below, these four circuits have wrongly decided this issue. To reach their decisions, these circuits did not correctly ascertain Congress' purpose when enacting the pre-emption provision and the exception at issue. Although the goal of the ICC Termination Act was to increase competition by eliminating state and local laws, that Act enacted neither the pre-emption provision relied upon by Ours Garage, nor the safety exemption relied upon by the City of Columbus. Instead, the Federal Aviation Administration Authorization Act of 1994 ("FAA Authorization Act") promulgated both the pre-emption provision and the safety exception at issue. The legislative history of that Act clearly establishes that Congress' intent was to eliminate disparate *economic* regulation, not local safety regulations. Additionally, the legislative history contained in the ICC Termination Act is entitled to little, if any, weight when determining the legislative intent of the

FAA Authorization Act. Furthermore, the four circuits did not presume that the States' historic police power to regulate the towing industry was not to be superseded unless Congress plainly intended to do so.

Moreover, these four circuits have ignored the clear command of *Mortier*. In *Mortier*, this Court expressly found that the term "State" is not "self-limiting." Both before and after *Mortier*, numerous courts, including this Court, have construed "State" in a pre-emption provision (and in other contexts) to include cities.

Finally, these circuits have wrongly relied on the maxim that "the expression of one thing is the exclusion of another." This maxim has force only if the provisions in question were included within the same legislative enactment. In this case, they were not. In addition, a court should not apply this maxim to exclude agents of a party included in a statute. Moreover, this maxim is subordinate to legislative intent. Here, the legislative history of the FAA Authorization Act clearly shows that Congress did not intend to eliminate municipal safety regulation when enacting that law. Perhaps for these reasons, this Court has warned lower courts several times about the dangers of blindly using this maxim.

As the Sixth Circuit has unmistakably erred in holding that Section 14501(c) pre-empts cities from regulating tow truck operations, this Court must correct that error.

ARGUMENT

I. The Sixth Circuit's Decision Clearly Misapplies *Medtronic*.

A. The Framework of Pre-emption Analysis.

The Supremacy Clause of the United States Constitution declares that "the Laws of the United States . . . shall be the supreme Law of the Land . . . , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. As a consequence, state laws are pre-empted when they conflict with a federal law, and they must yield to that law. *See, e.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210-11 (1824). Federal law pre-empts state law under the Supremacy Clause when (1) Congress defines explicitly the extent to which a federal statute pre-empts state law ("express pre-emption"), (2) the state law directly conflicts with the force or purpose of federal law ("conflict pre-emption"), or (3) the federal law occupies a legislative field to such an extent that it is reasonable to infer that Congress left no room for state regulation in that field ("field pre-emption"). *Cipollone*, 505 U.S. at 516. Although a municipal ordinance rather than a state law is at issue in this case, the constitutionality of a municipal ordinance for purposes of the Supremacy Clause is "analyzed in the same way as that of statewide laws." *Mortier*, 501 U.S. at 605.

Pre-emption "'may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57 (1990)). On the other hand, "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Cipollone*, 505 U.S. at 517.

Where a federal statute expressly pre-empts state or local law, "analysis of the scope of the pre-emption statute must begin with its text." *Medtronic v. Lohr*, 518 U.S. 470, 484 (1996) (citations omitted). The interpretation of the text is guided by two presumptions about the nature of pre-emption.

First, a court should "'start with the assumption that the historic police powers of the States [are] not to be superseded . . . unless that was the clear and manifest purpose of Congress.'" *Id.* at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *see also English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). This presumption is especially strong in areas such as health and safety measures. *English*, 496 U.S. at 79. This approach is "consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Medtronic*, 518 U.S. at 485.

The second presumption is that Congress' purpose is the "ultimate touchstone" of pre-emption analysis. *Id.* (quoting *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963)); *Cipollone*, 505 U.S. at 516. "Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it." *Medtronic*, 518 U.S at 485 (citation omitted). The "structure and purpose of the statute as a whole" may also be considered. *Id.* In addition, even with a clear expression of intent to pre-empt state and local regulation, a court must still determine the scope of pre-emption. *Id.*

B. The Sixth Circuit Misapplied Both *Medtronic* Presumptions.

1. Congress' Purpose When Enacting the Safety Exemption Was to Leave State Safety Authority Unaffected.

In *Ours Garage*, the Sixth Circuit relied completely on its decision in *Petrey* when affirming the district court's ruling that the City of Columbus could not regulate consensual towing. *Ours Garage*, 257 F.3d at 507. In turn, the Sixth Circuit found in *Petrey* that the goal of the ICC Termination Act was to increase competition among motor carriers by eliminating burdensome state and local laws. *See Petrey*, 246 F.3d at 563. Similarly, the Fifth, Ninth, and Eleventh Circuits also determined that the legislative history behind the enactment of the ICC Termination Act showed that Congress' purpose was to increase competition by eliminating state and local regulations. *See Stucky*, F.3d at 444-46; *Tocher*, 219 F.3d at 1051; *Mayer*, 153 F.3d at 546.

The City does not dispute that Congress generally intended to eliminate state and local regulation when enacting the ICC Termination Act. Nonetheless, the Sixth Circuit's focus on the ICC Termination Act misses the mark because the FAA Authorization Act contains *both* the pre-emption provision relied upon by Ours Garage and the safety exemption relied upon by the City of Columbus. *See* Pub. L. No. 103-305, § 601(c), 108 Stat. 1569, 1606 (1994). The legislative history of the FAA Authorization Act shows that Congress' deregulatory purpose was to eliminate disparate *economic* regulations, not local safety regulations:

> [P]reemption legislation is in the public interest as well as necessary to facilitate interstate commerce. *State economic regulation* of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets. . . . The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business.

H.R. Conf. Rep. No. 677, 103rd Cong., 2d Sess. at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759 (emphasis added). Specifically, legislative history demonstrates that Congress' purpose was to free the motor carrier industry from state and local economic regulation and to put that industry on a playing field level with that of the air carrier industry, which Congress had already deregulated by passing the Airline Deregulation Act of 1978. *See id.* at 85, 87, *reprinted in* 1994 U.S.C.C.A.N. at 1757, 1759. Thus, Congress intended to eliminate the competitive advantage that air carriers, such as Federal Express, had enjoyed under decisions interpreting the 1978 statute relative to motor carriers, such as United Parcel Service. *Id.*

By contrast, even though state safety regulation is presumably just as "diverse" as state economic regulation, the conference report does *not* say that safety regulation causes any problems. In fact, there is no evidence or congressional finding that municipal safety regulations would interfere with Congress' concern for competitiveness in tow trucking. The legislative history of the FAA Authorization Act indeed shows that state safety regulatory authority (presumably including the authority to delegate) was to be "unaffected" by the pre-emption provision. *See id.* at 84, 85, *reprinted in* 1994 U.S.C.C.A.N. at 1756, 1757 ("State authority to regulate safety, financial fitness and insurance . . . of motor carriers is unchanged, since State regulation

in those areas is not a price, route or service and thus is unaffected."); *see also id.* at 84, *reprinted in* 1994 U.S.C.C.A.N. at 1756 ("[N]othing in these new subsections contains a new grant of Federal authority to a State. . . . The intention of the conferees is solely to identify certain areas that are not preempted.").

2. Congress' Intent When Enacting the Nonconsensual Rate Exemption Is Not Relevant When Determining Its Intent on the Safety Exemption.

One year after passing the FAA Authorization Act, Congress enacted the ICC Termination Act. *See* Pub. L. No. 104-88, 109 Stat. 803 (1995). This statute recodified the pre-emption provision in its current form as a part of the Interstate Commerce Act ("ICA"). This statute also added an exception to pre-emption that authorized States and political subdivisions to enforce laws relating to the price of a nonconsensual tow. *See* 109 Stat. at 899. The House report for the ICC Termination Act noted that the added exception to the pre-emption provision "struck a balance between the need to protect consumers from exorbitant towing fees and the need for a free market in towing services." *See* H.R. Rep. No. 311, 104th Cong., 1st Sess. at 120 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 832. Accordingly, the provision was "not intended to permit re-regulation of any other aspect of tow truck operations." *Id.* at 119, *reprinted in* 1995 U.S.C.C.A.N. at 831.

The Fifth, Sixth, Ninth, and Eleventh Circuits' conclusion that Congress intended that Act to prohibit cities from regulating tow trucks except for the rates for nonconsensual tows was based on the comments of an individual legislator before the passage of the ICC Termination Act in 1995 and the Act's conference report.

See Stucky, 260 F.2d at 444 n.24 (statement of Rep. Rahall); *Petrey*, 246 F.3d at 563 (conference report); *Mayer*, 158 F.3d at 544-45 (conference report and statement of Rep. Rahall); *Tocher*, 219 F.3d at 1051 (relying on *Mayer*).

The conference report and the comments are inapposite for at least two reasons. First, the conference report and the comments do not address the safety exception at issue in this case; instead, they were made in connection with the enactment of the "nonconsensual rate" exception to the pre-emption provision in the ICC Termination Act. Second, even if the comments were somehow applicable, they occurred after the enactment of the exception at issue. Post-enactment statements are entitled to little weight. *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 132 (1974); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 639 n.34 (1967). The same is true for a post-enactment conference report because "the view of a later Congress cannot control the interpretation of an earlier enacted statute." *O'Gilvie v. United States*, 519 U.S. 79, 89 (1996). Thus, the Sixth Circuit erred when it based its decision on the legislative history of the ICC Termination Act because that history was post-enactment to the passage of the FAA Authorization Act.

3. Regulation of Tow Trucks Falls Within the Historic Police Powers of the States.

The issue in this case implicates an important federalism concern.[1] When analyzing the scope of a federal pre-emption

1. While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions. . . . The allocation of power contained in the Commerce Clause, for example, authorizes

(Cont'd)

provision, this Court for years has recognized that the analysis starts with the assumption that the statute does not supersede the "historic police powers of the States" unless that was "the clear and manifest purpose of Congress." *Medtronic*, 518 U.S. at 485.

The Court has defined the police power "as the authority to provide for the public health, safety, and morals." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991). For years, courts have acknowledged that States and their cities may exercise their police power by regulating tow trucks to prevent traffic congestion and attendant dangers. *See, e.g.*, *Librizzi v. Plunkett*, 16 A.2d 280, 281-82 (N.J. 1940); *Hempstead T–W. Corp. v. Town of Hempstead*, 177 N.Y.S.2d 445, 451-52 (N.Y. Sup. Ct. 1958), *aff'd*, 179 N.Y.S.2d 848 (N.Y. App. Div. 1958); *City of Chattanooga v. Fanberg*, 265 S.W.2d 15, 19-20 (Tenn. 1954); *Harris*, 157 S.W.2d at 711-12; *cf. Interstate Towing Ass'n, Inc. v. City of Cincinnati*, 6 F.3d 1154, 1165 (6th Cir. 1993) (noting "municipal regulation of the business of towing is not unusual"). In *Fanberg*, the court specifically noted that States often delegate their power to regulate tow trucks to their cities:

> It seems to us clear under many authorities that the business of carrying or transporting property for hire is a privilege, the licensing, regulation

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> Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

New York v. United States, 505 U.S. 1041, 144, 162-66 (1992) (citing *Coyle v. Oklahoma*, 221 U.S. 559, 565 (1911)); *see also Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926) ("neither government may destroy the other nor curtail in any substantial manner the exercise of its powers").

> and control of which is a legislative prerogative. This power to regulate the roads and streets is likewise a legislative prerogative and may be delegated by the Legislature of the State to the cities who in turn may by ordinance regulate control of the use and operation of wreckers or towing cars on its streets.

Id. at 19.

For decades, this Court also has recognized that States may regulate businesses that use streets:

> It is well established law that the highways of the state are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally at least, the legislature may prohibit or condition as it sees fit.

Stephenson v. Binford, 287 U.S. 251, 256 (1932). In fact, "[I]n no field has [this Court's] deference to state regulation been greater than that of highway safety regulation." *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 443-44 (1978).

Furthermore, this Court knows that States have traditionally delegated their regulatory authority to their cities. *See, e.g.*, *Mortier*, 501 U.S. at 607-09. In this case, the people of the State of Ohio have granted municipalities general authority "to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with the general laws." *See* Ohio Const. art. XVIII, § 3. In addition, the Ohio Legislature has expressly delegated its power to the City of Columbus to regulate motor

vehicles and the transportation of articles upon its highways. *See* Ohio Rev. Code Ann. §§ 715.22, 723.01 (Baldwin 1994). Most importantly, the Ohio Legislature has specifically exempted tow trucks from state law requirements for motor carriers, thereby allowing cities and other local governments to regulate tow trucks. *See* Ohio Rev. Code Ann. §§ 4921.02(A)(8), 4923.02(A)(10) (Baldwin Supp. 2001); *see also City of Cincinnati v. Reed*, 500 N.E.2d 333, 339 (Ohio Ct. App. 1985) (holding that state law authorized municipal towing ordinance). Based on the State of Ohio's long-standing delegation of its authority to regulate tow trucks, the City of Columbus enacted the laws at issue.

This Court has consistently regarded state regulations concerning public safety on streets and highways as inherently local in nature. *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). This Court's deference to the historic police power of the States and their cities not only is mandated by the Constitution, but also should result in the best protection of the public:

> The City Fathers of Chattanooga who enacted the Ordinance are presumed to be familiar with the local conditions and the necessity for the regulation of wreckers and towing cars. These legislative and administrative officials of the city are the ones who receive complaints about such things and they are the ones who are in a position to know what should be done to protect the public safety.

Fanberg, 265 S.W.2d at 20; *see also The Federalist* No. 17, at 107 (Alexander Hamilton), No. 46, at 316 (James Madison) (J. Cooke ed. 1961).

Here, Congress did not prescribe how States were to assert their authority when it enacted the FAA Authorization

Act. Congress must have known, however, that virtually all States delegate considerable police powers to their cities, including responsibility for the public's safety on streets and thoroughfares. Nonetheless, Congress, when promulgating the Act, did not explicitly prohibit cities from regulating the public-safety aspects of tow trucks.

Several state legislatures have examined Section 14501 and concluded that they may lawfully delegate their regulatory authority over tow trucks to some or all of their municipalities. *See, e.g.*, Cal. Veh. Code §§ 21100(g), 22850.5 (West 2001) (delegating State of California's regulatory authority over licensing and regulating the operation of tow truck service and tow truck drivers to its municipalities); La. Rev. Stat. Ann. § 32:1714(2) (West 2000) (delegating State of Louisiana's regulatory authority to its municipalities with a population of 450,000 or more); N.Y. Veh. & Traf. Law § 1642(a)(15) (McKinney 1996) (delegating New York State's regulatory authority to its municipalities with a population of more than one million); Tex. Transp. Code Ann. § 643.201(a) (Vernon Supp. 2002) (delegating State of Texas' regulatory authority to its municipalities).

One of the "first principles of constitutional adjudication" is "the basic presumption of the constitutional validity of a duly enacted state . . . law." *Lemon v. Kurtzman*, 411 U.S. 192, 208 (1973) (citation omitted). Here, the Sixth Circuit did not presume that the Ohio statutes delegating regulatory authority to cities were constitutional. Instead, the new pre-emption presumption proposed by the *Mayer*, *Tocher*, *Petrey*, and *Stucky* courts turns the *Medtronic* presumption on its head and would represent a significant

intrusion into the States' abilities to handle matters entrusted to them by Congress.[2]

4. Summary.

As stated above, Congress' purpose is the "ultimate touchstone" of pre-emption analysis. *Medtronic*, 518 U.S. at 485. Here, the legislative history of the FAA Authorization Act shows that Congress' deregulatory purpose was to eliminate disparate economic regulations, not local safety regulations. Moreover, the legislative history of the ICC Termination Act is entitled to little, if any, weight when interpreting the FAA Authorization Act.

To the extent that the scope of Congress' purpose may be unclear, this Court should not construe the text of Section 14501 in a way that unnecessarily frustrates the ability of cities to respond to the safety concerns created by local towing companies. A construction allowing deference to local

2. Courts have taken notice of the "great advantage" tow companies have over the owners of towed cars. *California ex rel. Renne v. Servantes*, 103 Cal. Rptr. 2d 870, 872 (Cal. Ct. App. 2001) (citing *Porter v. City of Atlanta,* 384 S.E.2d 631, 634 (Ga. 1989)), *review denied*, (Cal. May 16, 2001), *petition for cert. filed*, 70 U.S.L.W. 3162 (U.S. Aug. 14, 2001) (No. 01-336). This advantage can lead to widespread abuses of the public. *Servantes*, 103 Cal. Rptr. 2d at 872-73, 878, 879.

Recognizing the dangers that these abuses may present to public safety as well as inherent dangers presented by tow trucks, the State of Texas has left much of the field of tow truck regulation to its municipalities, presumably believing that it could lawfully do so. If this Court were to hold that States cannot delegate such authority, then this precedent would hamper the States in their efforts to protect public safety. This is not sound public policy. *See Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 776 (2d Cir. 1999), *cert. denied*, 528 U.S. 868 (1999) (finding its holding consistent with public policy).

responsibility and expertise would be consistent with the presumption against pre-emption of state and local regulations. *Id.*

II. The Sixth Circuit's Decision Deprives Cities of Their Police Power Contrary to the Clear Mandate of *Mortier*.

In *Petrey*, the Sixth Circuit found that, because the law at issue in *Mortier* differed from Section 14501(c), *Mortier* did not always require the term "State" in a statute to include a State's political subdivisions. *See Petrey*, 246 F.3d at 561-62; *see also Stucky*, F.3d at 443; *Mayer*, 153 F.3d at 546-47.

On its face, Section 14501(c)(2)(A) excepts only "State" regulatory authority concerning safety and insurance.[3] For purposes of the ICA, "State" means "the 50 States of the United States and the District of Columbia." 49 U.S.C. § 13102(18). By contrast, Section 14501(c)(2)(C) allows a State and its political subdivisions to regulate the prices of nonconsensual tows.

Although Subsection (c)(2)(A) expressly refers only to "State" regulatory authority, that does not mean that this subsection does not also allow municipal regulation. For example, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), although explicitly permitting only "a State" to regulate pesticides subject to certain federal restrictions, and defining "State" as "a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and American Samoa," does not limit a State's power to redelegate its authority to a political subdivision. *Mortier*, 501 U.S. at 607-09, 611-12.

3. Even though Congress failed to mention municipal safety regulation in this section, it did not explicitly pre-empt municipal safety regulation. Had Congress intended not to except municipal safety regulations, Congress could have said so.

The statute at issue in *Mortier* provided:

> (a) A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v.

Nonetheless, this Court found the language of Sections 136(aa) and 136v to be "wholly inadequate to convey an express preemptive intent." *Mortier*, 501 U.S. at 607. "Mere silence" would not "suffice to establish 'a clear and manifest purpose' to pre-empt local authority." *Id.*; *see also Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963) (pre-emption of regulation enacted pursuant to police power will not occur "in the absence of an unambiguous congressional mandate to that effect"). The Court also observed the well-established rule that units of local government are created to exercise such powers as a State may entrust to them in its absolute discretion. *Mortier*, 501 U.S. at 607-08. Consequently, "the exclusion of political subdivisions cannot be inferred from the express authorization to the 'State[s]' because *political subdivisions are components of the very entity the statute empowers.*"[4] *Id.* at 608 (emphasis added). In other

4. For example, the City is an integral component of the State of Texas. Municipal ordinances *are* state law and are prosecuted "In the name and by the authority of the State of Texas." Tex. Code Crim. Proc. Ann. art. 45.019 (Vernon Supp. 2002); *see also* Tex. Code Crim. Proc. Ann. art. 45.201 (Vernon Supp. 2002) (authorizing city attorney to represent the State in prosecutions in municipal (Cont'd)

words, the term "State" is not "self-limiting." *Mortier*, 501 U.S. at 612. To the contrary, the most "plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the '*absolute discretion*' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities."

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courts). Moreover, under the Texas Constitution, the City is a home-rule municipality. *See* Special Act of April 13, 1907, 30th Leg., 1st C.S., ch. 71, 1907 Tex. Spec. Laws 568; Tex. Const. art. XI, § 5; *see also Dallas Merchants & Concessionaires Ass'n v. City of Dallas*, 852 S.W.2d 489, 490 (Tex. 1993). The Texas Local Government Code provides that a home-rule municipality has the full power of local self-government. Tex. Loc. Gov't Code Ann. § 51.072 (Vernon 1999). Accordingly, "[h]ome-rule cities possess the full power of self government and look to the Legislature not for grants of power, but only for limitations on their power." *Dallas Merchants*, 852 S.W.2d at 490-91.

"Cities occupy an important place in our system of government. In many instances they have been created as arms of the State government, with authority to help protect and maintain the general welfare of the public." *L-M-S Inc. v. Blackwell*, 233 S.W.2d 286, 288 (Tex. 1950). When a home-rule city conducts a governmental activity or function, it is operating as an arm or agent of the State. *Dilley v. City of Houston*, 222 S.W.2d 992, 993 (Tex. 1949).

The regulation of tow trucks in Texas is beyond doubt a governmental function. The Texas Legislature has expressly delegated its power to the City to regulate tow truck operations: "[A] municipality may regulate the operation of a tow truck to the extent allowed by federal law." Tex. Transp. Code Ann. § 643.201(a). Furthermore, the Texas Tort Claims Act recognizes "regulation of traffic" and "parking facilities" as governmental functions. Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(a)(21), (25) (Vernon Supp. 2002); *see also Town of Ascarate v. Villalobos*, 223 S.W.2d 945, 950 (Tex. 1949) ("A municipal corporation is considered an arm of the State, and has the police power to protect the safety of the public, and in the exercise of its police power to protect the public from traffic hazards").

Id. at 608 (emphasis added). Thus, the express delegation of regulatory authority to a State may well mean that it is permitted to redelegate its authority to a "political subdivision[] either specifically or by leaving undisturbed . . . existing statutes that would otherwise provide [a] local government with ample authority to regulate." *Id.* at 612.[5]

5. Since 1991, several lower courts have applied *Mortier* to hold that federal statutes allowing a "State" to regulate also authorize its political subdivisions to do so. *See Fireman's Fund Ins. Co. v. Lodi*, 271 F.3d 911, 932-36 (9th Cir. 2001) (holding that the term "State" in pre-emption provisions in Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675, does not prohibit municipalities from enacting hazardous waste regulations); *Cablevision of Boston, Inc. v. Public Improvement Comm'n of Boston*, 184 F.3d 88, 98 (1st Cir. 1999) (holding that pre-emption provision of Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.*, does not prohibit States from delegating their powers under the Act); *Coparr, Ltd. v. City of Boulder*, 942 F.2d 724, 726 (10th Cir. 1991) (holding that FIFRA does not prohibit States from authorizing municipalities to impose notification requirements concerning pesticide use on private individuals, property owners, and the general public); *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 591 (N.D. Tex. 1998) (holding that Telecommunications Act of 1996 does not prohibit States from re-delegating their powers under the Act); *AT&T Communications of the Southwest, Inc. v. City of Austin*, 975 F. Supp. 928, 939-40 (W.D. Tex. 1997) (citing *Mortier* for proposition that "State's authority to regulate under a federal statute necessarily includes the authority to delegate local regulation, including regulation for public health, safety, and welfare purposes, to local authorities"); *cf. Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 54-55 (2d Cir. 1988) (holding that the term "State" in pre-emption provision of Occupational Safety and Health Act of 1970, 29 U.S.C. § 667, does not prohibit cities from enacting laws to protect public from asbestos removal); *California ex rel. Deukmejian v. County of Mendocino*, 683 P.2d 1150, 1159-60 (Cal. 1984) (holding FIFRA does not preclude States from authorizing local governments to enact restrictive pesticide regulations); *Citizens for a Safer Community v. City of Rochester*, 627 N.Y.S.2d 193, 200-01 (Cont'd)

Other regulatory exceptions listed in Subsection (c)(2)(A) confirm the conclusion that Congress' use of the term "a State" is not limiting. One example is the exception allowing "a State to impose highway route controls or limitations based on . . . the hazardous nature of the cargo" refers to the HMTA Act. *See* 49 U.S.C. §§ 5101-5127. The HMTA Act's structure allows a city to exercise authority over the routing of hazardous materials shipments by a motor carrier if it complies with the standards prescribed by the Act and the Secretary of Transportation. *See* 49 U.S.C. §§ 5112, 5125; *see also Jersey Cent. Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1112-13 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986); *City of New York v. United States Dep't of Transp.*, 715 F.2d 732 (2d Cir. 1983), *appeal dismissed and cert. denied*, 465 U.S. 1055 (1984); *National Tank Truck Carriers, Inc. v. City of New York*, 677 F.2d 270 (2d Cir. 1982).

Notwithstanding this weight of authority, the Fifth, Sixth, and Eleventh Circuits all explicitly refused to apply *Mortier* to Section 14501(c). *See Stucky*, 260 F.3d at 443; *Petrey*, 246 F.3d at 561-62; *Mayer*, 153 F.3d at 546-47.

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(N.Y. Sup. Ct. 1994) (holding that Second Amendment to the U.S. Constitution and Civilian Marksmanship Program, 10 U.S.C. §§ 4307-4311, *repealed by* Defense Authorization Act of 1996, P.L. 104-106, § 1624, 110 Stat. 186, 522 (1996), did not pre-empt city ordinance that restricted possession of automatic and semiautomatic weapons); *Arnold v. Cleveland*, 616 N.E.2d 163, 173 (Ohio 1993) (holding that Second Amendment to the U.S. Constitution and Civilian Marksmanship Program did not pre-empt city ordinance prohibiting possession and sale of "assault weapons").

III. A Reversal of *Ours Garage* Does Not Conflict with *BFP* and *Russello*.

Despite the clear command of *Mortier*, the Sixth Circuit as well as the Fifth, Ninth and Eleventh Circuits followed "the presumption that, when Congress omits certain language in a particular subsection of a statute and includes the language in other subsections, the omission is intentional rather than accidental." *Stucky*, 260 F.3d at 440-41 (relying on *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also Petrey*, 246 F.3d at 561 (relying on *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994), and *Russello*); *Tocher*, 219 F.3d at 1051; *Mayer*, 153 F.3d at 545 (relying on *BFP* and *Russello*). This is simply another way of stating the maxim "*expressio unius est exclusio alterius,*" which means "the expression of one thing is the exclusion of another."

This maxim should not be applied to the FAA Authorization Act for several reasons. First, *Russello* itself counsels that this presumption has force only if the provisions in question are included within the same legislative enactment: "'[W]here Congress includes particular language in one section of a statute but omits it in *another section of the same Act*, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello*, 464 U.S. at 23 (citation omitted; brackets original; emphasis added). Here, the two exceptions to pre-emption were passed in two different acts.

Second, this maxim should not be applied to exclude agents of a party included in a statute. Seven years before *Mortier*, the California Supreme Court examined whether FIFRA, a statute that authorized "State" regulation of pesticides, precluded States from authorizing local governments to enact such regulations. *See County of*

Mendocino, 683 P.2d 1150. Some plaintiffs relied upon this maxim, claiming that the reference to "State" should be read as excluding local governmental regulation. That court rejected the application of the maxim for two reasons:

> Because local governmental agencies are political subdivisions of the state, the maxim may not be applied. The maxim may be applied to comparable or perhaps similar nouns, but there is no reason to apply it to exclude agents of the enumerated party. Moreover, even if the maxim were applicable, it would only warrant the conclusion that the statute did not authorize regulation; it would not establish that local regulation was prohibited.

Id. at 1160.

Third, this maxim is subordinate to legislative intent or policy. *See, e.g., Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983); *Securities & Exch. Comm'n v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943)

> However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.

Ford, 273 U.S. at 611; *Johnson v. Southern Pac. Co.*, 196 U.S. 1, 15 (1904). Fourth, this maxim is only an aid to statutory construction and not a rule of law. *United States v.*

Castro, 837 F.2d 441, 443 n.2 (11th Cir. 1988). Accordingly, the maxim should be used with care. *See Castro*, 837 F.2d at 443 n.2. Perhaps for these reasons, this Court has quoted Lord Justice Lopes' warning about using this maxim:

> It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The "exclusio" is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice.

Ford v. United States, 273 U.S. 593, 611-12 (1927).

Here, the legislative history of the FAA Authorization Act shows that Congress' purpose was to eliminate disparate economic regulations, not local safety laws. Furthermore, the legislative history of the ICC Termination Act is entitled to little, if any, weight. Therefore, the application of the maxim to Section 14501(c) would lead to an injustice.

CONCLUSION

The Court should reverse the judgment of the Sixth Circuit and hold that 49 U.S.C. § 14501(c) does not pre-empt cities from regulating vehicle towing.

Respectfully submitted,

MADELEINE B. JOHNSON
City Attorney
CHRISTOPHER D. BOWERS*
Assistant City Attorney
City of Dallas
7BN Dallas City Hall
1500 Marilla Street
Dallas, Texas 75201-6318
(214) 670-3519

Counsel for Amicus

* *Counsel of Record*